

Bethlehem-Pine Manor LP

v.

Town of Bethlehem

Docket Nos.: 22367-05PT and 22886-06PT

ORDER AND HEARING NOTICE

On January 23, 2008, the board held a recorded telephone conference to discuss the status, processing and resolution of these two appeals, which involve the ad valorem assessment of the same “Property” for successive tax years.¹ Mark Lutter of Northeast Property Tax Consultants represented the “Taxpayer” and Mike Fournier of Brett S. Purvis & Associates, Inc. represented the “Town” in this telephone conference. During the conference, the board explained how it intended to proceed and this Order reflects the board’s discussion with the parties’ representatives.

Before ruling on the Taxpayer’s tax year 2005 appeal (Docket No. 22367-05PT), which was heard by the board on November 8, 2007, the board will hold a hearing on the Taxpayer’s tax year 2006 appeal (Docket No. 22886-06PT) **at 9:00 a.m. on May 8, 2008 at the board’s offices located at Johnson Hall, 107 Pleasant Street, Concord, New Hampshire.** At this hearing, the board intends to hear additional evidence and arguments regarding the low income

¹ The Property is a residential, six unit rental property at 13 Arlington Street, Map 204/Lot 056. The assessments under appeal are \$413,800 (land \$33,000; buildings \$380,800) in tax year 2005 and \$399,000 (land \$43,700; buildings \$355,300) in tax year 2006.

housing tax credit (“LIHTC”) program established and administered by the federal and state governments and whether and how the LIHTC should affect the ad valorem assessment of the Property.

The board is mindful of its March 18, 2005 Order in Epping Senior Housing Associates LP v. Town of Epping, BTLA Docket Nos. 19135-01PT, 19855-02PT and 20263-03PT (the “Epping Order”). The Epping Order acknowledged the issue is “as a matter of first impression” and ruled “LIHTC’s can and should be considered by the Town in making ad valorem assessments on the Property under New Hampshire law.” Id. at p. 2. As noted in that ruling, “there are no New Hampshire cases specifically addressing the effects of tax credits on the valuation of property for tax assessment purposes.” Id.

The Epping Order took note of cases from other jurisdictions, where a majority of the courts had similarly ruled that the LIHTC program should be considered for property taxation purposes.² The Epping Order, id. at pp. 8-9, also cited Steele v. Town of Allenstown, 124 N.H. 487 (1984) and Royal Gardens Co. v. City of Concord, 114 N.H. 668 (1974), cases involving the taxation of properties benefited and burdened by earlier federal housing subsidy programs and holding it was proper to consider both the benefits and burdens of these governmental programs and their impacts on value for ad valorem taxation purposes.

While cognizant of this line of authority, the board intends to weigh the potential relevance of several New Hampshire cases (summarized below, but not mentioned by the parties to this appeal or discussed in the Epping Order) suggesting the entire ‘bundle of rights’ must be valued for taxation purposes and assessed to the fee owner of the property, however those

² Id. at pp. 10-12. Since the Epping Order, at least two other states have joined the majority of jurisdictions concluding the value of LIHTC’s should be considered for property tax purposes. See Town Square Limited Partnership v. Clay County Board of Equalization, 704 N.W.2d 896 (S.D. 2005); and Huron Ridge LP v. Ypsilanti Township, 737 N.W.2d 187 (Mich. App. 2007).

property rights may be divided or ‘fractured’ among different parties. These cases could be relevant to the present appeals since an LIHTC can be viewed as a voluntary restriction on real estate for a temporary period of time (15 or 30 years, for example) that limits the full bundle of fee simple rights (such as the right to obtain higher income based on market rents) for the benefit of others (the public welfare and interest in affordable housing within the municipality). Cf. RSA 72:6 (“All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.”); and RSA 21:21, I (“Real estate” encompasses “lands, tenements, and hereditaments, and all rights thereto and interests therein.”).

In LSP Assoc. v. Town of Gilford, 142 N.H. 369, 376-77 (1997), for example, the supreme court majority concluded a homeowner’s association owned the full bundle of rights pertaining to the land in question and the individual unit owners merely had a “license” to use the site (where each structure was located on the property) that was not subject to ad valorem taxation. The court in LSP viewed a license as “a transient or impermanent interest which does not constitute an interest in land” and “is merely a revocable personal privilege to perform an act on another individual’s property.” (Quoting from Quality Discount Market v. Laconia Planning Board, 132 N.H. 734, 739 (1990)). The majority therefore concluded only the association, the legal owner of the land, not the individual unit owners, the members in the association, could be taxed on the so-called “site amenity” value attributable to the location of each structure on the land.

Similarly, in Appeal of Reid, 143 N.H. 246, 248-49 (1998), the supreme court majority reversed the board’s decision to tax leasehold interests in the land because, under New Hampshire law, such leases are taxable only if they are “perpetual,” “renewable indefinitely” or the lease holder “agreed to pay taxes on the value of the land.” Id. at 249 (citing Indian Head

Nat'l Bank v. City of Portsmouth, 117 N.H. 954, 955 (1977) and Hampton Beach Casino v. Town of Hampton, 140 N.H. 785, 790 (1996)).

These decisions, and their interpretation or application to newer, more variegated property right arrangements, are not without controversy. Both LSP and Reid were decided by a 3-2 majority of the supreme court, with forceful dissents by two members (Justice Horton, joined by Justice Broderick). In LSP, the dissent would have allowed the municipality to assess, as a separate real estate interest, “the rights and interests that are inherent in unit ownership” (i.e., those conferred on members of the association), LSP, 142 N.H. at 379. In Reid, the dissent would have allowed taxing the leaseholders “for value elements shared by the land [owned by the “Melendy Pond Authority,” deeded from the municipality] and the building [owned by individual leaseholders],” Reid, 143 N.H. at 255.

The board therefore will defer ruling on the 2005 tax appeal (Docket No. 22367-05PT) until it hears any additional legal arguments and evidence on the 2006 tax appeal (Docket No. 22886-06PT) at the scheduled hearing. To the extent resolution of the legal issues (that are not property specific) may affect the interests of others who are not parties to these appeals,³ such as other taxpayers and municipalities concerned with the proper taxation of properties affected by LIHTC's, the board will entertain petitions for intervention, provided they are timely filed. See RSA 541-A:32. To this end, the board is sending copies of this Order to several organizations (listed in the Certification) for wider distribution; this Order will also be posted on the board's website.

³ According to the Taxpayer's expert, there were at least 25 (or 26) LIHTC properties involving new construction or substantial rehabilitation administered by the New Hampshire Housing Finance Authority in 2003-2007, which generated a total of \$10.95 million in tax credits. See Taxpayer Exhibit No. 6 at pp. 5 and 9.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Paul B. Franklin, Chairman

Douglas S. Ricard, Member

Albert F. Shamash, Esq., Member

Certification

I hereby certify a copy of the foregoing Order and Hearing Notice has this date been mailed, postage prepaid, to: Mark Lutter, Northeast Property Tax Consultants, 14 Roy Drive, Hudson, NH 03051; Mike Fournier, Brett S. Purvis, Brett S. Purvis & Associates, Inc., 3 High Street, Unit 2A, P.O. Box 767, Sanbornville, NH 03872, Municipality Representative; and Chairman, Board of Selectmen, Town of Bethlehem, PO Box 189, Bethlehem, NH 03574. Copies of this Order and Hearing Notice have also been mailed to the New Hampshire Association of Assessing Officials, C/O LGC, P.O. Box 617, Concord, N.H. 03302-0617 and to the Northern New England Housing Investment Fund, Attn. Jon Anton, President, 183 Middle Street, 3rd Floor, Portland, ME 04101.

Date: February 1, 2008

Anne M. Stelmach, Clerk